APPENDIX A

OPINIONS BELOW

OPINION OF THE COURT OF APPEALS, 305 F. 2d 143 (1962)

James Oddie, Edward Cwiertniewicz
John Penzak, Oscar King, Harry C.
Bremmer, Plaintiffs-Appellees,

v.

Ross Gear and Tool Company,
Inc., Defendant-Appellant.

No. 14712.

United States Court of Appeals
Sixth Circuit.

July 16, 1962.

SHACKELFORD MILLER, Jr., Chief Judge.

The plaintiffs, who are citizens of the State of Michigan and are employees of the Gemmer Manufacturing Company Division of the defendant, Ross Gear and Tool Company, Inc., an Indiana corporation, are members of Local 80 of the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, UAW (AFL-CIO), hereinafter referred to as the "Union," the bargaining representative for said employees. They filed this action in the District Court on June 15, 1961, on behalf

of themselves and other employees similarly situated for a declaration of rights with respect to their seniority or recall-to-work rights under the collective bargaining agreement then in effect between the Union and the Gemmer division of the defendant. Jurisdiction is based upon diversity of citizenship and the amount in controversy. Section 1332 (a), Title 28, United States Code. McGarry v. Lentz, D.C., 9 F. 2d 680, 683, affirmed, 13 F. 2d 51, C.A. 6th, cert. denied, 273 U.S. 716, 47 S. Ct. 108, 71 L. Ed. 855.

The material facts, which are not in dispute, are as follows. The defendant is a manufacturer of steering gears, with operations in the United States, England, France, Brazil, Australia, Germany and Spain. The Gemmer Manufacturing Company was an independent corporation until 1956 when it was purchased by the Ross Gear and Tool Company. Its plant was located at Detroit, Michigan. Since 1936 the Union has represented the employees at this Detroit plant. Although there were collective bargaining contracts prior to 1948, we are here concerned with only the collective bargaining contracts of 1947, 1951, 1955 and 1958 and the negotiations in connection therewith. The current contract, hereinafter referred to more in detail, was entered into December 19, 1958, and was due to expire on October 1, 1961, several months after this action was filed.

Prior to the filing of this action, the defendant had a plant in Lafayette, Indiana, known as "Ross Gear and Tool Company, Inc." hereinafter called the Lafayette plant, and a plant in Detroit, Michigan, known as "Gemmer Manufacturing Company, a division of Ross Gear and Tool Company, Inc." hereinafter called the Detroit plant. The Detroit plant was located on Mt. Elliott, between Milwaukee and Harper.

On January 13, 1961, the defendant posted a notice to the employees at the Detroit plant, signed by John E. Jarrell, President, reading as follows:

> "TO All Our Employees:
>
> "The Ross Gear and Tool Company has formed a new division: 'The Tennessee Division of the Ross Gear and Tool Co., Inc.'
>
> "This division is building a plant at Lebanon, Tennessee to manufacture new products in addition to some products which are now manufactured at Lafayette and Detroit.
>
> "The pitman arm manufacturing of both Lafayette and Detroit is being transferred to the new division.
>
> "Economic studies are being made on the basis of present and potential business in order to determine if the manufacturing of additional products should be combined in existing divisions or transferred to the new division."

In a letter to defendant dated January 25, 1961, Ken Morris, Co-Director UAW Region 1, stated that the notice of January 13, 1961, had caused much concern on the part of the employees as it pertained to their continued job security. He wrote:

> "Because it is evident that some jobs are leaving the Detroit Plant for the Lebanon Tennessee Plant, we are requesting that any employee affected because of the transfer of a job, be given an opportunity to go to Lebanon with the job.
>
> "We feel you will agree that the long service given by an employee to the company should be allowed to continue if he is willing to follow the operation to the new company location."

He asked for a meeting at the Company's earliest convenience "to reach an understanding on the methods and principle of employees right to transfer with their jobs."

After an exchange of several letters, in which the Company took the position that there was no need for a meeting and that it might be more appropriate to hold such a meeting after the Company had completed certain studies, Morris wrote on February 22, 1961, that if he did not hear from the Company in the next forty-eight hours indicating a willingness to arrange a meeting, the Union would file immediate complaint with the National Labor Relations Board, plus taking such other legal steps necessary to require the Company to bargain in good faith with the organization which represented the Company's employees. By letter of February 27, 1961, the Company agreed to the requested meeting, suggesting the date of March 8, 1961, as the date therefor.

In the meantime, on February 6, 1961, defendant posted a second notice to the employees at the Detroit plant, signed by G. Bissett, who was Vice-President of the Gemmer Division, which referred to recent newspaper and radio stories which suggested that the defendant intended to move its entire Detroit operation to Lebanon. This notice concluded with the following:

> "The economic studies referred to in the January 13 announcement are still in progress. Should these studies indicate the advisability of moving or combining the production of other products, either here or at other plants, you will be advised by Mr. Jarrell or myself."

On March 3, 1961, the defendant posted a third notice to the employees at the Detroit plant, signed by its President, which stated that the purpose of the notice was to

help clarify some of the conflicting rumors which were rampant in the factory and even in the city. The notice stated that in recent years the Company had increasing difficulty in meeting competition to the point where some items were being produced at a price that was not profitable in view of the production costs, and that it was necessary that the management of the Company do everything that could be done to produce the Company's products at the lowest possible production cost; that the former Gemmer Manufacturing Company was having a very unfavorable profit experience when it was acquired by the defendant in 1956, and that while the defendant hoped that it could do much better with Gemmer's facilities than Gemmer had done, this had not proven to be the case, with the exception of one year, and that the rapidly changing economic and competitive conditions in general and those in Gemmer's field in particular, had complicated the situation to such an extent as to make it appear that the Company would never be able to operate profitably in the Detroit plant. It also stated that many Southern states had authorized cities to subsidize the building of new manufacturing plants; that the construction of the new Tennessee plant was being subsidized by the City of Lebanon; that other advantages, such as lower taxes, lower operating costs, and the like, were also offered; that the Company planned that new products would be put in the new plant and that studies would be made to see what other items might be produced there; that the Company was in the process of completing these studies, but did not presently have definite conclusions to announce; that it was a possibility that a major portion of the items then being produced in the Detroit plant would be transferred to the Lebanon plant; and that the Company would consider all the factors carefully and would not cease operations at Detroit if it could be avoided.

The meeting between the defendant and the Union took place on March 9, 1961. At the meeting the defendant did not agree to the Union's request that any employee affected because of the transfer of the job be given the opportunity to go to Lebanon with the job and his seniority rights pertaining thereto. The defendant took the position that employees whose jobs were eliminated would be treated the same as other employees in the past had been treated in job elimination situations, that is, they would be given the rights provided for them in the seniority provisions of the current contract between the Company and the Union; that these employees, consistent with their seniority rights, would be retained at work in the Detroit plant; that the Company did not plan to offer reemployment at the Tennessee Division to the employees whose jobs at the Detroit plant were eliminated, and that in the event employees were laid off as a result of the transfer, the laid-off employees would not be the occupants of the transferred jobs.

On May 9, 1961, Morris wrote to the Company stating that the Company was under a duty to recall at Lebanon employees laid-off in Detroit as a Federal Court of Appeals recently made clear in Zdanok v. Glidden Co., 288 F. 2d 99, C.A. 2nd. He closed this letter by stating:

> "This is to advise you that if you persist in your present determination to breach this duty, legal action will be taken."

On May 22, 1961, the defendant posted a notice to the employees at the Detroit plant, signed by its President, which referred to the establishment of the Lebanon plant and the study which had been given to the overall picture, and advised that, in view of the fact that it had become obvious that the Detroit operation could not be expected

to be a profitable one on a competitive basis, the defendant had decided, with reluctance on the part of its officials, to terminate the Detroit operation of the Gemmer Division of the Company. The notice stated that the Company expected to start the transfer of operations by July 1, 1961, and that on or about September 2, 1961, it expected to discontinue production at Detroit and commence moving the remainder of the production and maintenance equipment.

Thereafter, the plaintiffs filed their complaint in the present action, which set out the foregoing fact and took the position that the seniority rights of the defendant's Detroit employees under the 1958 collective bargaining agreement survived the transfer of defendant's Detroit operations to Lebanon, and that when defendant commenced at Lebanon its operations transferred from Detroit, it would be under a duty to honor at Lebanon the seniority rights of its Detroit employees and recall them to work, in accordance with those rights. They also contended that these seniority rights would continue in existence and would be applicable to operations at the Lebanon plant after October 1, 1961, at which time the current collective bargaining agreement terminated. Defendant by its answer took the position that the 1958 bargaining agreement, under which the plaintiffs claimed the seniority rights in question, was applicable by its express provisions only to the Detroit plant and that, accordingly, it had no application to the operations of the defendant at its plant in Lebanon, Tennessee. The Company also took the position that, even if the collective bargaining agreement was applicable to the Lebanon operations, it was only applicable until October 1, 1961, at which time the bargaining agreement terminated by its express terms.

This presents for consideration the provisions of the collective bargaining agreement which pertain to these opposing contentions. The 1958 agreement, in effect at the time, provides as follows in its opening paragraphs:

"AGREEMENT

"THIS AGREEMENT is entered into this 19th day of December, 1958, by and between GEMMER MANUFACTURING COMPANY (of Detroit, Michigan), which is a division of Ross Gear and Tool Company, Inc. (a corporation of Lafayette, Indiana), and which Gemmer is hereinafter referred to as the 'Company,' and the INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW (AFL-CIO), AND LOCAL 80, THEREOF, hereinafter referred to as the 'Union.'

"WHEREAS, the parties to this agreement desire to promote the spirit of harmony and cooperation between them and insure the most efficient operation of the Company's plant, the following agreement is entered into:

"RECOGNITION

"1. The Company recognizes the union as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in the next succeeding paragraph."

There is no dispute between the parties that paragraphs 17-40 of the agreement, under the heading of "Seniority" give certain seniority and recall-to-work rights to the plain-

tiffs and other employees of the Gemmer Company in the Company's operation of the Detroit plant. What is presented for decision is whether these seniority and recall-to-work rights are applicable to the defendant's operation of its plant at Lebanon, Tennessee, and, if so, whether they ceased to exist or expired with the expiration of the collective bargaining agreement on October 1, 1961.

The District Judge rendered an opinion on July 5, 1961, which is reported at 195 F. Supp. 826, in which he held that the 1958 collective bargaining agreement granted employees certain benefits and rights that became "vested" in the sense that they could not be unilaterally denied without their consent or other agreed means, such as the right to discharge; that these rights extended beyond the time limitations of the collective bargaining agreement; that these rights applied to a "plant" regardless of physical location under the contract and previous contracts; and that these rights included, among other things, seniority rights for the purpose of rehiring after layoff (which could go beyond an anniversary date) as provided in the agreement. The District Judge said that he felt bound by the ruling and reasoning of the Glidden case, supra, which was the case referred to in the Union's letter of May 9, 1961, and the contract being not to the contrary, the defendant had an obligation and duty to rehire on the basis of seniority those employees laid off in Detroit when that plant's operations were removed to Lebanon, Tennessee. An order declaring the rights of the parties in accordance with the views expressed in the opinion was entered July 7, 1961, from which this appeal was taken by the defendant.

Plaintiffs, in support of the judgment, rely strongly upon the ruling of the Court of Appeals for the Second Circuit in Zdanok v. Glidden Co., supra, 288 F. 2d 99, and the rea-

soning of the District Judge in the present case, particularly the statement in his opinion that "The Gemmer Division plant is the same plant wherever it is moved, in spite of the fact it might be known by a different name. Mere change of form will not change the substance, nor will mere change of location. This is the same plant, same machinery and equipment, same operation, same officers and supervisors, but in a new climate." They urge upon us that it would be unreasonable under such circumstances to have the agreement applicable to the plant while operating in Detroit and to hold that it is not applicable to the same plant merely because it has been moved to Tennessee.

Defendant relies upon the express wording of the agreement, which it contends specifically provides that the agreement is applicable only to a plant located within the city limits of Detroit; that there are good and valid reasons for restricting the application of the agreement to its plants within the city limits of Detroit, but, irrespective of that, in the absence of the restriction being contrary to public policy, it is of no concern to the Court whether the restriction is reasonable or unreasonable when the parties have expressly contracted for that result.

The collective bargaining agreement provides that the Company recognize the Union as the exclusive representative "of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit for the purposes of collective bargaining, * * *" This is plain, unambiguous language. The agreement gave seniority and recall-to-work rights to employees in the defendant's plants which were within the city limits of Detroit. It gave no such rights to employees of a plant in Tennessee. Plaintiffs concede that the agreement is not applicable

to employees in a company plant in Michigan, even though only a short distance outside of the city limits of Detroit. They concede that the agreement would not be applicable to employees in a new plant in Tennessee other than the Gemmer plant. We see no material distinction, with respect to geographical location, between a new plant in Tennessee and the relocation of the Gemmer plant in Tennessee. In both cases the plant, new or old, is not in the city limits of Detroit, as limited by the agreement. It is true, as the District Judge pointed out, that the plant in Tennessee has the same machinery and equipment, the same officers and supervisors, and the same operation, but, as also stated by him, it is in a "new climate," which of course recognizes that it is not in the city limits of Detroit, but in Tennessee. Whether it would be advisable or reasonable under the existing circumstances to have the agreement apply to the plant in Tennessee is not for the Court to decide. We must construe the contract as it is written, rather than make a new contract for the parties. Standard Oil Co. v. Ogden & Moffett Co., 242 F. 2d 287, 291-292, C.A. 6th; Dura Electric Lamp Co. v. Westinghouse Electric Corp., 249 F. 2d 5, 7, C.A. 3rd; Jenkins v. King, 224 Ind. 164, 65 N. E. 2d 121, 163 A.L.R. 397; Babcock Coal & Coke Co. v. Brackens Creek Coal Land Co., 128 W. Va. 676, 37 S. E. 2d 519, 163 A.L.R. 871.

We are not in agreement with plaintiffs' contention that the agreement was for the benefit of the employees of the Gemmer Company, wherever it might be, in Detroit or in Tennessee, and that the reference in the agreement to the city limits of Detroit was merely a reference to where the Gemmer Company was then located. This ignores the fact that the reference is not to the employees of the Gemmer Company but to the Company's employees "in its plant or *plants*" within the city limits of Detroit. (Em-

phasis added.) The fact that the beneficiaries of the contract are specifically designated as the employees in all of the Company's plants within the city limits of Detroit instead of merely the employees of the Gemmer Company in Detroit makes it plain that the words were not used for the purpose of merely giving the present location of the Gemmer Company.

This argument is essentially the one upon which the Court of Appeals for the Second Circuit rested its decision in Zdanok v. Glidden Co., supra. But in that case there was a specific reference to one plant only, the address of which was specifically given, and there was no specific geographical limitation such as is contained in the agreement in the present case. In that respect the agreement in the Glidden Company case is materially different from the agreement in the present case, and in our opinion is not applicable on this phase of the case. In Metal Polishers, etc. v. Viking Equipment Co., 278 F. 2d 142, C.A. 3rd, also relied upon by the plaintiffs, it appears that the new location of the plant involved was still within the geographical limits referred to in the collective bargaining agreement, which, of course, is vitally different from the situation which we are considering in the present case.

Nor do we think there is merit in the contention that plaintiffs' seniority rights at the Detroit plant are "vested" rights, which cannot be cut off or defeated by the relocation of the plant in Tennessee. The argument is based upon the theory that through years of employment at the Gemmer plant they have "earned" such seniority rights in accordance with the terms of the agreement, which cannot be cancelled or taken from them by unilateral action on the part of the defendants, at least during the life of the bargaining agreement. Whether such rights

continue in existence beyond the end of the current bargaining agreement is another question, which we are not now considering. Clearly, the word "vested" is not the correct word to describe these rights, in that there are a number of ways in which such rights may be terminated or lost. Section 31 of the bargaining agreement provides for loss of seniority rights for any one of nine separate reasons, including quitting work or being discharged and not being reinstated through the grievance procedure. If an employee should die, his "earned" seniority rights become worthless and are not enforceable rights against the employer. If the company discontinues in business and terminates its operations, the employees' seniority rights are terminated. Local Lodge, 2040, etc. v. Servel, Inc., 268 F. 2d 692, 697-699, C.A. 7th. It appears to be well settled that such rights of the individual employees can be bargained away by the Union representing them in collective bargaining. Elder v. New York Central R. Co., 152 F. 2d 361, C.A. 6th; System Federation No. 59 etc. v. Louisiana & A. Ry. Co., 119 F. 2d 509, 515, C.A. 5th. It was so recognized in Zdanok v. Glidden Co., supra, 288 F. 2d 99, 103, C.A. 2nd.

Accordingly, we do not have the question of whether plaintiffs' "vested" rights can be validly terminated by relocation of the plant in Tennessee. Rather, it is the question of what rights, if any, the plaintiffs have under the express provisions of the bargaining agreement upon the relocation of the plant in Tennessee. If no rights were acquired under the bargaining agreement as employees at the Tennessee plant, it necessarily follows that no rights have been cut off. If the 1958 bargaining agreement bargained away the employees' seniority rights which they had at the Detroit plant in the event they sought employment at a company plant in any city other than Detroit,

they lost their rights through operation of the contract. Elder v. New York Central R. Co., supra, 152 F. 2d 361, C.A. 6th; System Federation No. 59, etc. v. Louisiana & A. R. Co., supra, 119 F. 2d 509, 515, C.A. 5th. As heretofore pointed out, the only question which we have is what is the proper construction to be given to the 1958 agreement between the parties. Under our construction of the agreement the employees acquired no seniority rights under the 1958 agreement as employees at the Tennessee plant. Since no rights were acquired, we do not reach the question of any rights being cut off by unilateral action on the part of the defendant, either during the existence of the bargaining agreement or after its expiration.

The construction which we are presently giving to the collective bargaining agreement appears to be in accord with the construction also given to it by the Union until shortly before the filing of this action. In August 1947 Gemmer Manufacturing Company, predecessor of the Gemmer Company herein, entered into a collective bargaining agreement with the Union, in the preamble of which the address of Gemmer Manufacturing Company was given as 6400 Mr. Elliott Avenue, Detroit, Michigan. The recognition clause recognized the Union as the exclusive representative of its employees without any other designation or limitation of geographical area. The company maintained an experimental plant on Nine Mile Road just outside the city limits of Detroit. In the 1951 negotiations the Union, apparently recognizing that the 6400 Mt. Elliott Avenue address of the company in the 1947 agreement made it inapplicable to the experimental plant, and wishing to include the experimental plant in the 1951 agreement, proposed to delete the 6400 Mt. Elliott Avenue address from the preamble of the agreement and to change the wording of the paragraph dealing with recognition of the Union so

as to make the agreement apply to all employees of Gemmer Company in the greater Detroit area. The company rejected this proposal but did change the wording of the recognition clause so as to apply to its employees in "its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit"

This same language was again used in the bargaining agreement executed September 1, 1955, and expiring June 1, 1958. During the term of the 1955-1958 bargaining agreement Gemmer Manufacturing Company was acquired by the defendant.

In the negotiations leading up to the 1958 bargaining agreement the Union again proposed that the recognition clause be changed so as to apply to the Company's employees in the greater Detroit area, not restricted to the city limits. It also submitted a proposal that in the event the company moved its operations to other locations, the Union would be recognized for the purpose of collective bargaining on the matters of wages, hours, and conditions of employment and that certain problems involved, including moving costs and seniority transfers, be subject to negotiations. These proposals were rejected and the language in the 1955 agreement was again used.

It will be noticed that following the first notice to employees on January 13, 1961, about the new Tennessee division, the Union in its letter of January 25, 1961, to the Company made no claim of seniority rights with respect to employment at the Tennessee plant under the 1958 agreement. It merely requested that any employee affected because of the transfer of a job be given an opportunity to go to Lebanon with the job and stated, "We feel you will agree that the long service given by an employee to the

Company should be allowed to continue if he is willing to follow the operation to the new company location." It was not until May 29, 1961, following the decision in Zdanok v. Glidden Co., supra, on March 28, 1961, that the Union changed its "request" into a claim that such rights existed under the ruling in that case. This clearly seems to be a new and different construction of the agreement from that given by the Union to the agreement before this case was decided.

One of the fundamental rules in the construction of contracts is for the court to give great weight to the construction which the parties themselves have given to the contract as shown by their actions thereunder. Reynolds Metals Co v. Skinner, 166 F. 2d 66, 71, C.A. 6th, cert. denied, 334 U.S. 858, 68 S. Ct. 1528, 92 L. Ed. 1778; Begnaud v. White, 170 F. 2d 323, 325-326, C.A. 6th.

The judgment of the District Court is reversed and the case remanded to the District Court with instructions to enter a judgment declaring the rights of the parties in accordance with the views expressed herein.

OPINION OF UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN,—

195 F. Supp. 826 (July 5, 1961)

ODDIE v. ROSS GEAR & TOOL CO.

KAESS, District Judge:

Plaintiffs are employees who bring this action in behalf of themselves and their fellow seniority employees of the Gemmer Manufacturing Company, a division of Ross Gear and Tool Company, Inc., an Indiana corpora-

tion. They bring this action purportedly in behalf of themselves and others similarly situated for a declaration of rights, together with temporary injunctive relief, pending final adjudication, and any money damages that may be earned upon a final hearing.

The defendant is in the business of manufacturing steering gears for automobiles, etc., and is an Indiana corporation. The defendant company has two plants presently in operation, one its original plant in Indiana, and the acquired division, known as the Gemmer Manufacturing Company of Detroit, Michigan.

The Gemmer Division has recognized the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America UAW (AFL-CIO) and its Local Union Number 80, as exclusive bargaining agent of its employees at the Detroit plant, and had entered into a collective bargaining agreement with such Union.

The defendant company, Ross Gear and Tool Company, Inc., acquired certain property in Lebanon, Tennessee, and on January 13, 1961 posted a notice advising the employees of the Gemmer Division that it had formed a Tennessee Division, and that some products then manufactured in Detroit would be transferred to Tennessee. Later, however, it became apparent, and there seems to be no doubt, that the entire Gemmer Division, lock, stock and barrel, is to be moved to Lebanon, Tennessee, and to be called the Tennessee Division of the Ross Gear and Tool Company, Inc. On May 22, 1961 the defendant announced its decision to terminate the plant operations conducted by the Gemmer Division in Detroit and further advised that the equipment and operations are to be transferred to its new division, beginning July 1, 1961, with production being concluded in the Gemmer Division on or about September 2, 1961. Thus

the transfer or move will be in two phases—one beginning July 1, 1961 and the concluding phase on September 2, 1961. The first phase, however, will not affect or terminate the employment of the plaintiffs or affect their seniority rights. However the defendant advises that all seniority rights will be terminated on September 2, 1961 and the Detroit plant is to be closed.

The basic facts seem clear in this respect. The defendant company proposes to close its plant at Detroit, Michigan, and move it to Lebanon, Tennessee.

If this were all, it would thus far be clear that the defendant could do practically whatever it chose to do, at least with respect to its labor and employment relations, but there is and has been a labor contract in existence for over twenty years, its present expiration being October 1, 1961. The defendant company and its predecessor have been a party to the contract, as has been Local Number 80 of the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America UAW (AFL-CIO).

During this time certain valuable rights have been created by contract, to both the employer and the employee. Perhaps those rights gravitate more to one side than the other, but certainly affect both.

In, and by reason of, the past and present contracts, the employees became beneficiaries of certain rights, to quote but one for the moment, certain pension rights or retirement benefits which can and do survive the contract and are so contemplated by the parties.

The issue here is, do seniority rights survive by analogy as an earned right?

In *Zdanok v. Glidden Co.*, 288 F. 2d 99 (103) seniority is called a "vested" right, or one "earned", as a type of unemployment insurance "earned and acquired by continuous service."

The court goes on to say, however, at page 103, that "the *employee* owning that right, *or his authorized Union agent*, could bargain away the employee's rights" (Italics ours).

In our case here the contract is still in force. Neither the Union nor the employees have sought to change it—nor perhaps would they. But the issue at the moment evolves about the proposition as to whether or not the contract can be annulled unilaterally by the mere moving of the defendant's plant to another state.

To be consistent with the *Glidden* case, supra, if that were the only issue, the answer would obviously be "No." Therefore this court must determine whether or not the contract now in force, by its terms may have bargained away that right.

It becomes essential to determine the provisions of the contract and to determine its intended meaning. First we must look to the contract as a whole and attempt to apply normal meaning to the words themselves, and then, if they be ambiguous, inquire into the history and surrounding circumstances to elicit their meaning and the intention of the parties.

The present contract of 1958 says, following its opening preamble and in its first section, entitled "Recognition":

> "1. The Company recognizes the union as the exclusive representative of its employees in *its plant* or *plants* which are located in that portion of the greater Detroit area which is located *within the*

city limits of Detroit for the purpose of collective bargaining on matters of wages, hours and conditions of employment. * * *"

Evidence was submitted by the defendant which disclosed that in those contracts duly negotiated by the Union *prior* to the 1951 contract, the following clause was in its place:

"1. The Company recognizes the Union as the exclusive representative of its employees for the purpose of collective bargaining on matters of wages, hours and conditions of employment. * * *"

In the collective bargaining agreement of 1951 (as well as in those thereafter) the above opening provision of the contract was changed to read as follows:

"(1) The Company recognizes the Union as the exclusive representative of its employees in its plant or plants which are located in that portion of the greater Detroit area which is located within the city limits of Detroit for the purpose of collective bargaining on the matter of wages, hours and conditions of employment. * * *"

This last quoted language remained and was used verbatim as a part of the 1955 and 1958 contracts, the latter being the one here involved and expiring some three months from now.

During the term of the 1955 to 1958 contract Gemmer Manufacturing Company was acquired by the defendant Ross Gear and Tool Company, Inc., an Indiana corporation, and Gemmer continued to be operated as a division of Ross Gear and Tool Company, Inc.

Defendant submits that during the negotiation of the 1958 contract (that which is now in force and expiring October 1, 1961) the Union submitted the following as a substitute for the above Section 1:

"RECOGNITION

"1. The Company recognizes the union as the exclusive representative of its employees in its plant or plants which are located in the greater Detroit area for the purpose of collective bargaining on matters of wages, hours and conditions of employment, excluding those mentioned in paragraph 2.

(a) In the event the company creates other plants or facilities regardless of location under the administration of the company, the union shall be recognized for the purpose of collective bargaining on matters of wages, hours, conditions of employment, seniority transfers, and all matters embodied in this agreement.

(b) In the event the company moves its operations to other locations, the union shall be recognized for the purpose of collective bargaining on matters of wages, hours and conditions of employment. Should this condition occur this matter will be subject to negotiations between the company and the union, such as moving costs of employees, severance pay, seniority transfers, and all other matters pertaining to this situation."

Such proposal was declined by the defendant and Section 1 of the contract remained as it had been prior thereto and since the 1951 contract.

The normal inference that one would draw from such a proposed substitute section, and then to compare it with the Section 1 of the contract then in force (as quoted o. page 5, from 1951 contract) promptly leads one to believe that the parties had negotiated on the problem of moving t. Lebanon, Tennessee, or at least moving somewhere, and had agreed that all matters involved in the contract would

and could have only force and effect within the limitations of the city of Detroit. In effect, it appeared the Union had conceded and bargained away all the benefits of the employees in the event the plant moved from within the city limits of Detroit.

However, testimony taken in this respect showed the situation surrounding the negotiations in 1951 to be quite different. Gemmer had another plant in the area at that time, which was located just over the city limits of Detroit, an experimental plant, which the Union sought to obtain within its bargaining agreement. The Company declined and the rephrasing of Section 1 was in contemplation of that situation, and not any proposed move of the plant.

Referring above to the proposed change involving moving or changing of locations as stated and proposed by the Union in its negotiations in 1958 agreement (the one presently in force), testimony disclosed that with the acquisition of the Gemmer Division by the defendant Ross Gear and Tool Company, Inc., the corporation had two plants, one its original plant in Indiana and the acquired plant, Gemmer Manufacturing Company in Detroit. Because of various reasons (none important here) there had been many rumors reaching the ears of the Union that the defendant would move or, more properly, consolidate its Detroit operation with the Indiana plant, thus operating to jeopardize the interest of the local Union. In order to anticipate such a change, the Local proposed the section referred to, involving moving or transferring. Further testimony intimated that the Union did not press the provision on learning another Local of the same International Union, United Automobile, Aircraft and Agricultral Implement Workers of America UAW (AFL-CIO) was the bargaining agent at the Indiana plant and felt they could probably work out any problems between them covering seniority.

Thus, on closer observation it seems quite clear that the intent of the parties was not that which at first look might have bargained away certain rights and benefits of the employees, since the reasons and purposes for the contract changes were well known to the parties, but were for reasons *other* than in contemplation of any possible move of the Detroit plant to another distinct location.

Therefore, this Court is of the opinion whatever emphasis the defendant now chooses to place on Section 1 goes for naught, and we must then return to the contract to determine whether the seniority rights and benefits of the plaintiffs, are in jeopardy. This Court feels bounded by the *Glidden* case, *supra*, and its reasoning, and since there is nothing within the contract now in force to the contrary, those seniority rights are to continue.

We next come to the geographical situation, as advanced by the defendant. Defendant further claims that the limitations within Section 1 terminate the seniority benefits of the plaintiffs on its moving its plant to Tennessee. We cannot agree. Section 1 applies only with respect to the "*recognition*" of the *Union*, and has no geographical limitations as to the benefits of the *employees* and their rights under the contract.

This Court is reluctant to reach any conclusion with respect to the effect the company's move might have on the Union itself, particularly since the Union itself has instituted similar litigation pending before another Judge of this Court. However, in order to make our meaning clear, it might be that since the recognition clause goes only to the *Union* as an entity, it could follow that its right to represent the employees in Tennessee has been bargained away by Section 1. However, we must leave any such decision in the determination of the other case.

To reach our conclusion this Court's reasoning is based on this premise. The Gemmer Division plant is the same plant wherever it is moved, in spite of the fact it might be known by a different name. Mere change of form will not change the substance, nor will mere change of location. This is the same plant, same machinery and equipment, same operation, same officers and supervisors, but in a new climate. The benefits created for the employees under that contract should not be said to be unilaterally terminated by mere change of location. Such logic seems the more reasonable and just in the light of the real meaning of Section 1 and more specifically when the contract still has until October 1, 1961 to run. The mere fact that there is a termination date in a collective bargaining agreement does not terminate all the rights and benefits of the employees under that agreement, but merely designates a certain time agreed upon by the parties when there would be further negotiations concerning those rights and benefits. Therefore the fact that this agreement in question has a termination date does not automatically remove all of the rights and benefits previously acquired by the employees. Although, as in this case, the agreement itself with the Union as a bargaining agent might have been terminated by the move to Lebanon, the rights and benefits that have accrued to the individual employees persist and cannot be unilaterally denied by the employer without the employees' consent. Among these rights and benefits would be included the right of seniority or, as more specifically involved in this case, *the right to be rehired by the employer after a lay-off, as stated in the contract.* Nothing herein, however, should be construed to mean that at the time of the expiration of the contract, new provisions may not be agreed upon, to the extent of an entirely new contract, nor that the employees may not select a new bargaining agent, or that

they can bargain away, alter or enlarge any of their rights, even to the extent of having a Union.

Our conclusion implies that the Union, as an identity, might only be able to represent the plaintiffs and those similarly situated in Detroit, but we are satisfied that it does not terminate all the rights of the plaintiffs created by a contract that has been in existence for some twenty years and upwards, and which was made in contemplation of those future rights.

It is the Court's conclusion:

1. That the collective bargaining agreement grants the employees certain benefits and rights that become "vested" in the sense that they cannot be unilaterally denied without their consent or other agreed means, such as the right to discharge.

2. That these rights extend beyond the time limitations of the collective bargaining agreement.

3. That these rights apply to a "plant" regardless of physical location under this contract and previous contracts.

4. That these rights include, among other things, seniority rights for the purpose of rehiring after layoff (which could go beyond an anniversary date) as provided in the agreement.

5. That the limitation as set forth in Section 1, the recognition clause of this agreement, applies only to the extent of Union representation and does not affect future benefits and rights of employees agreed upon by contract.

Therefore, the contract being not to the contrary, and pursuant to the holding in the *Glidden* case, *supra,* defendant has an obligation and duty to rehire on the basis of

seniority those employees laid off in Detroit when that plant's operations are removed to Lebanon, Tennessee.

Should this decision, as requested by plaintiffs on these undisputed facts, not be dispositive under the Federal Declaratory Judgment Act (28 USCA 2201), plaintiffs may request the Court to take such further action as might be necessary at the time.

FRED W. KAESS,
United States District Judge.

APPENDIX B

CONFLICTING OPINIONS

OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN ZDANOK v. GLIDDEN CO.—288 F. 2d 99 (1961)

Olga Zdanok, John Zacharczyk, Mary A. Hackett, Quitman Williams and Marcelle Kreischer,
Plaintiffs-Appellants,

v.

Glidden Company, Durkee Famous Foods Division, a Foreign Corporation, Defendant-Appellee.

No. 217, Docket 26542.

United States Court of Appeals.
Second Circuit.

Argued Feb. 8, 1961.

Decided March 28, 1961.

Petition for Rehearing and Rehearing in Banc Denied April 24, 1961.

Before LUMBARD, Chief Judge, MADDEN, Judge, United States Court of Claims,* and WATERMAN, Circuit Judge.

MADDEN, Judge.

The plaintiffs sued in the District Court for the Southern District of New York for damages for alleged breach by the defendant of a contract made for their benefit by a labor union. The District Court had jurisdiction because

* Sitting by designation.

of diversity of citizenship. The Court decided that they were not entitled to recover, 185 F. Supp. 441, and they have appealed.

From 1929 until November 30, 1957, the defendant operated a plant at Elmhurst, New York, known as its Durkee Famous Foods Division. The plaintiffs are members of General Warehousemen's Union, Local 852, which is affiliated with the Teamsters' Union. The defendant and Local 852 had had collective bargaining agreements since December 1, 1949, each agreement covering a two-year period. The last agreement covered the period December 1, 1955 to November 30, 1957.

Each agreement contained a provision establishing a system of seniority which required that in case of a curtailment of production, employees were to be laid off in the reverse order of seniority. If, at the time he was laid off, an employee had had five or more years of continuous employment, his seniority would entitle him to be reemployed if an opening for reemployment for one having his seniority occurred within three years after his lay-off. If he had had less than five years of employment before his lay-off, he would be entitled to reemployment if an opening for one with his seniority occurred within two years after his lay-off. The contract between the union and the employer contained a non-contributory pension plan, with normal retirement on pension at age 65, early retirement at 55 if the employee had had 15 years of service, and other types of pensions under specified conditions. The contract also included hospital, medical and surgical insurance, life insurance and accidental death insurance to be paid for by the employer.

On September 16, 1957, the defendant gave written notice to the union that it would terminate the collective bargaining contract at its expiration date, November 30, 1957.

After September 16 it began to reduce production at Elmhurst, and to remove its machinery and equipment from Elmhurst to a newly established plant at Bethlehem, Pennsylvania. The employment of four of the five plaintiffs was terminated on November 1, and that of the fifth one on November 18. The ages of the five plaintiffs, at the time of their discharge, ranged from 43 to 61 years, and their periods of employment with the defendant ranged from 10 to 25 years.

The defendant removed a considerable part of its machinery from its Elmhurst plant to the new Bethlehem plant, and manufactured there a number of the same products. The Bethlehem plant was more modern and efficient, and apparently had a considerable number of new machines, in addition to the ones moved from Elmhurst. Some of the products formerly made at Elmhurst were, after the closing of that plant, made at the defendant's Louisville plant.

There was work at the Bethlehem plant similar to that done at Elmhurst by three of the plaintiffs. As to the other two plaintiffs, who were men, aged 43 and 49, their work at Elmhurst was to check merchandise that was loaded or unloaded from trucks leaving or entering that plant. At the Bethlehem plant such duties have been incorporated into other job classifications which specify the employee to load and unload the trucks and to operate an electric walking type lift truck to stack the merchandise in the storage area as well as to check the incoming and outgoing merchandise that the employee loads and unloads. This different Bethlehem work would not seem to have required any skill that could not have been acquired in a short time.

The defendant offered to give fair consideration to applications for employment at its Bethlehem plant, to its former employees at Elmhurst, only if they would come

to Bethlehem and make application there on the same basis as new applicants who might seek employment there. Two Elmhurst employees, not plaintiffs herein, made such applications, and their applications were accepted. Only one of them actually went to work. He has been considered as a new employee at Bethlehem, with no seniority carried over from Elmhurst.

The plaintiffs contend that they were, as beneficiaries of the contract between their union and the defendant, entitled to the jobs which were created by the opening of the plant at Bethlehem. They say that they were laid off because of the removal of the machinery and the cessation of operations at Elmhurst, and that as work was opened up at Bethlehem they were entitled, by reason of their seniority and the contract provisions relating to it, to go to work at Bethlehem with the seniority which they had acquired at Elmhurst.

The defendant offers several defenses. We consider first the defense of *res judicata*. That defense was considered and rejected, first by Judge Dimock, on a motion by the defendant for summary judgment and again, after the defendant had filed its answer asserting *res judicata* as an affirmative defense, by Judge Palmieri, in his decision and opinion on the merits of the case.

Local 852, the plaintiffs' union served on the defendant a notice of intention to arbitrate certain designated disputes, pursuant to the arbitration provision in the union's contract with the defendant. The defendant made a motion in the Supreme Court of New York to stay arbitration, on the ground that the disputes were not arbitrable under the arbitration provision of the contract. That provision said:

> "Any question, grievance or dispute arising out of and involving the interpretation and application *of the specific terms* of this Agreement • • • shall, at the request of either party, be referred to the New York State Mediation Board for arbitration." (Emphasis supplied.)

The court granted the defendant's motion, on the ground that the subjects sought to be arbitated were not covered by *the specific terms* of the contract. The court's opinion[1] lays much emphasis on the word *specific* in the agreement to arbitrate and says that "no one is under a duty to resort to arbitration unless by clear language he has so agreed." The court concluded its opinion with this sentence:

> "It follows from all the foregoing that Glidden's motion to stay arbitration must be granted, whatever other remedies the Union may have with respect to the alleged disputes."

The New York court's opinion as a whole, and its concluding paragraph seem to us to show that the court was deciding nothing more than that the arbitration provision, as narrowly written, did not confer jurisdiction upon an arbitration tribunal to adjudicate the disputes in question. If the court had decided, as the defendant claims, that the contract as a whole, in its circumstances, and including its fair implications, conferred no rights upon the union or the employees with regard to the asserted disputes, the court's concluding paragraph defies understanding.

The defendant also contends that because the collective bargaining agreement contained provisions for the arbitration of disputes, the plaintiffs are not entitled to individually enforce their rights under the agreement. The defendant relies heavily upon Parker v. Borock, 1959, 5

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[1] Matter of General Warehousemen's Union, 1958, 10 Misc. 2d 700, 172 N.Y.S. 2d 678.

N.Y. 2d 156, 182 N.Y.S. 2d 577, 156 N.E. 2d 297, as support for its contention that the plaintiffs individually are not entitled to enforce the rights which they claim here. In the Parker case, the plaintiff had been discharged "for cause." He invoked the grievance procedure of the collective bargaining agreement between his union and employer. He was not reinstated, and the union refused his request to seek arbitration. He thereupon moved in the United States District Court to compel the employer to arbitrate his discharge. The motion was denied.

The plaintiff then sued in the New York state courts for money damages for breach of the collective agreement, asserting that the employer did not have "cause" to discharge him. The defendant moved for a stay pending arbitration, but its motion was denied on the ground that only the employer or the union, and not an employee, could seek a submission to arbitration. The defendant then moved for summary judgment. The New York Supreme Court denied the motion, but the Appellate Division's reversal, granting the motion, was affirmed by the Court of Appeals.

The Court of Appeals said, 5 N.Y. 2d at page 160, 182 N.Y. 2d at page 580, 156 N.E. 2d at page 299, that "the employee is the direct beneficiary" of provisions in a collective agreement prohibiting discharge of an employee except for cause. The court held, however, that the plaintiff, who was also "bound by and limited to the provisions of the agreement," had "entrusted his rights to his union representative," who alone could have sought arbitration of the plaintiff's discharge. 5 N.Y. 2d at page 161, 182 N.Y.S. 2d at page 580, 156 N.E. 2d at pages 299-300. The court noted that the plaintiff's only remedy would be against the union for failing to fulfill its duties under the agreement.

The Parker case is, therefore, significantly different from the instant case. In Parker, the question which the plaintiff sought to litigate had been entrusted by him, under the collective agreement, to the arbitration process.[1] That was the interpretation which the New York Court of Appeals placed upon the contract there before it. In the instant case as we have seen, the Supreme Court of New York has held that the dispute with which this suit is concerned is *not* covered by the arbitration provision of the agreement.[2] The plaintiffs have not, therefore, entrusted to their union representative the rights which they now seek to enforce.

As to the merits of the plaintiffs' claims, the defendant takes the bold position that the collective bargaining contract conferred upon the employees no rights which survived the contract. It says, at page 27 of its memorandum:

> "Even if the Elmhurst operations had continued but the collective bargaining agreement had expired, the seniority status of plaintiffs would not have survived the termination of that agreement. For it is only by reason of existing provisions in the agreement that provisions relating to the seniority have any application. When such provisions no longer exist, seniority no longer exists."

The defendant may have assumed this bold and uncompromising position because it feels uneasy about Judge Palmieri's having based his decision solely upon the geographical shift of the plaintiff's factory operations. We discuss that problem later herein.

We think the defendant's language, quoted above, is not supportable. Suppose an employee had completed five years of service in October, 1957. Under the seniority provision of the collective bargaining agreement, he thinks that

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[2] Matter of General Warehousemen's Union, *supra*.

he has earned and acquired, by continuous service, valuable insurance against unemployment; that by reason of having worked continuously for this company longer than many of his fellow workmen, he could not be laid off unless the lay-off cut deep into the working force; that even if he should be reached in a lay-off, he would be sure to be re-employed if at any time within three years after the lay-off his name should be reached on the seniority list, for reemployment. As we have seen, the defendant's position is that the employee had not acquired any such rights.

Rights embodied in a collective bargaining contract negotiated by a union "inure to the direct benefit of employees and may be the subject of a cause of action." Parker v. Borock, 5 N.Y. 2d 156, 182 N.Y.S. 2d 577, 156 N.E. 2d 297-298, citing Barth v. Addie Co., 271 N.Y. 31, 2 N.E. 2d 34, and other New York cases. If one has in October a right to demand performance of the corresponding obligation at any relevant time within a period of three years, it would be strange if the other contracting party could unilaterally terminate the right at the end of three weeks. Of course the employee owning the right, or his authorized union agent, could bargain away the employee's right. Nothing of that kind occurred in the instant case.

At the time the Elmhurst employees were discharged, those who had reached the age of 65 and had otherwise satisfied the conditions prescribed in the collective bargaining agreement for receiving retired pay, were placed on the defendant's retired list and have been and are currently receiving their retired pay. Similarly, those who had reached the age of 55, or who had become permanently disabled in the service of the defendant, and had had 15 years of employment with the defendant, are receiving their retired pay. Those who had 15 years of service and had

reached the age of 45 at the time of their discharge were advised by the defendant that they had vested rights to retirement benefits and would begin to receive payments when they reached the age of 65.

These rights to retired pay, though their realization will extend far into the future, and though they arise solely and only out of the terms of the union agreement with the defendant, have been treated as "vested" rights and are being voluntarily honored by the defendant. This was, we suppose, because the employees had earned these rights by compliance with the terms of the contract, and the fact that the contract was not renewed, and that other workmen in the future might not have the opportunity to earn similar rights, was irrelevant. We think the plaintiff employees had, by the same token, "earned" their valuable unemployment insurance, and that their rights in it were "vested" and could not be unilaterally annulled.

We think, then, that if the plaintiff had continued to operate the Elmhurst plant, without a renewal of the union contract, or had reopened it after it had been closed for a time, the employees would have been entitled to reemployment, with seniority. This brings us to the issue which Judge Palmieri in the District Court found to be the critical issue, i.e., whether the unit to which the employees' rights attached "extended beyond the Elmhurst plant." [185 F. Supp. 447]. He held that the rights were not enforceable except in the Elmhurst plant, and therefor denied recovery. With deference, we disagree with the conclusion.

The union contract, in its preamble, recited that it was made by the defendant company

> "for and on behalf of its plant facilities located at Corona Avenue and 94th Street, Elmhurst, Long Island, New York."

If this narrow geographical description is treated as setting fixed boundaries upon the scope of the contract, difficulties immediately arise. If the plant moved from 94th Street to 93rd Street in Elmhurst, an entire structure of valuable legal rights would tumble down. *A fortiori* if the plant moved to a site a few miles or a good many miles away, the consequence would be the same. But one would be obliged to wonder why so catastrophic a consequence should follow a mere change in physical location. And it would be hard to conjure up a reason why it should. Rather it would seem that the recital in the contract would be analogous to the *descriptio personae* familiar to the law in various situations.

A rational construction of the contract would seem to require that the statement of location was nothing more than a reference to the then existing situation, and had none of the vital significance which the defendant would attach to it. Contracts must, in all fairness, be construed *ut res magis valeat quam pereat.* If not, the reasonable expectations of the parties are sacrificed to sheer verbalism.

In the instant case the plant was, of course, not moved from 94th Street to 93rd Street in Elmhurst, nor from Elmhurst to another town within commuting distance of the then residences of the employees. It was moved to a city in another state. That fact does not seem to us to be decisive. It would, of course, have confronted the employees with troublesome problems. They would have had to decide whether the advantages of continued employment with this employer, the right to which they had earned in Elmhurst, were sufficient to induce them to make so considerable a move. It is probable that many of them would not have made the move. Those to whom the defendant had offered employment in Bethlehem, who did not accept the offer,

would have, in effect, resigned their seniority and the rights that accompanied continued employment.

We can see no expense or embarrassment to the defendant which would have resulted from its adopting the more rational, not to say humane, construction of its contract. The plaintiffs were, so far as appears, competent and satisfactory employees. They had long since completed the period of probation prescribed in the union contract. It would seem that they would have been at least as useful employees as newly hired applicants. The defendant's Bethlehem plant was a new plant. There could not have been an existing union representative or a collective bargaining agreement there, at the time the plant was opened.

In the circumstances, no detriment to the defendant would have resulted from a recognition by the defendant of rights in its employees corresponding with their reasonable expectations. In that situation, a construction of the contract which would disappoint those expectations would be irrational and destructive.

It follows from what we have said that the plaintiffs were entitled to be employed at the defendant's Bethlehem plant, with the seniority and reemployment rights which they had acquired at the Elmhurst plant. The refusal of the defendant to recognize that entitlement was a breach of contract, and the plaintiffs are entitled to recover the damages which that breach has caused them.

The plaintiffs allege in their complaint that they have been "deprived of employment by the defendant," as a result of the defendant's conduct recited above. That is an adequate allegation that they would have accepted employment at Bethlehem if it had been offered to them on the terms to which they were entitled. Proof of this allegation may well fall short of complete conviction, but the

trier of fact will not penalize the plaintiffs on account of the uncertainty which has been caused by the defendant's conduct.

Whatever pension rights would have been earned by employment at Bethlehem, if it had been accepted, must be recognized by the defendant.

Since the case will be remanded, we leave to the District Court consideration of the right of recovery, if any, in connection with the welfare plan and the group insurance plan which were included in the union agreement.

[8] It appears that the named plaintiff Mary A. Hackett is deceased, and that no motion for substitution has been made. Unless a proper motion is made, the District Court will dismiss the complaint as to that plaintiff.

The judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

LUMBARD, Chief Judge (dissenting).

For the reasons persuasively set forth in Judge Palmieri's careful and thorough opinion, reported at 185 F. Supp. 441, I would affirm.

It is immaterial to the resolution of the question before us that the employment of competent and satisfactory employees is suddenly terminated, or even that the employer has acted ungenerously, as indeed it has. We are called upon to construe the contract upon which the parties agreed and not to substitute for it one with more humane or less destructive terms.

The parties have assumed here that the Supreme Court's decision in Textile Workers Union v. Lincoln Mills, 1957,

353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972, did not *sub silentio* overrule the distinction between "individual" and "union" rights announced in Association of Westinghouse Salaried Employees v. Westinghouse Elec. Co., 1955, 348 U.S. 437, 461, 75 S. Ct. 488, 99 L. Ed. 510. Although the survival of this distinction gives the employees standing personally to assert "individual" rights arising out of a collective-bargaining agreement, Local Lodge 2040 Intern. Ass'n of Machinists A.F.L.-C.I.O. v. Servel, Inc., 7 Cir., 268 F. 2d 692, 696, certiorari denied, 1959, 361 U.S. 884, 80 S. Ct. 155, 4 L. Ed. 2d 120, the contract should be construed in light of federal substantive law pursuant to § 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185.

The federal cases hold that seniority is not inherent in the employment relationship but arises out of the contract. E.g., Elder v. New York Central R.R., 6 Cir., 1945, 152 F. 2d 361, 364; see Note, 54 Nw. U.L. Rev. 646, 649-50 (1959). If rights are to persist beyond the term of the collective-bargaining agreement, the agreement must so provide or be susceptible of such construction. See United Steelworkers v. Enterprise Wheel & Car Corp., 1960, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424.

The agreement we are here called upon to interpret did not expressly provide for any retention of seniority rights beyond the termination of the collective-bargaining agreement. The employees claim, however, that by agreeing to rehire on the basis of seniority for two or three years after layoff, the employer undertook not only to retain seniority rights after the expiration of the agreement but to extend existing seniority privileges to any other location to which the work then done at Elmhurst would be assigned. Relocation of an employer's plant does not, of course, automatically terminate all rights under a collective-bargain-

ing agreement; whether such rights continue depends on the terms of the contract. See Metal Polishers, Buffers, Platers, and Helpers Intern. Union, Local 44 A.F.L.-C.I.O. v. Viking Equipment Co., 3 Cir., 1960, 278 F. 2d 142. The issue here is whether this collective-bargaining agreement gave the employees the right to "follow the work" to the new site. I would hold that it did not.

The closing of the Elmhurst plant and the removal of the defendant's operations to a new location were concededly done in good faith and were not wholly unforeseeable. As Judge Palmieri points out, it is not uncommon for the parties to extend beyond a single plant the area in which seniority rights are to apply. Surely unions are now fully of age and are able to protect themselves and their members at the bargaining table. The consequences of dismissing the plaintiffs' case might indeed be unfortunate and even "catastrophic" from their point of view, but it is hardly "irrational and destructive" for a court to leave the parties as they are if they have never seen fit to provide otherwise.

OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN METAL POLISHERS UNION v. VIKING EQUIPMENT CO., 272 F. 2d 142

Metal Polishers, Buffers, Platers and Helpers International Union, Local 44, AFL-CIO,
Appellant,
v.
Viking Equipment Company, a Corporation of the State of New Jersey.

No. 13215.

United States Court of Appeals
Third Circuit.

Argued May 9, 1960.

Decided May 13, 1960.

Before GOODRICH, McLAUGHLIN and STALEY, Circuit Judges.

PER CURIAM.

Plaintiff union sues the defendant asking for money damages for breach of contract, for submission of a dispute to an impartial mediator in accordance with the terms of the contract and, in a second count, for an injunction restraining defendant from entering into or continuing in effect any agreement with any labor organization other than the plaintiff for the class of employees alleged to be covered by the plaintiff's contract. Jurisdiction of the district court is based on Section 301(a) of the Labor-Management Relations Act, 29 U.S.C.A. §185 (a). The dis-

trict judge denied the motion for preliminary injunction and held a motion for summary judgment under consideration.

The plaintiff union had a collective bargaining contract with the defendant employer which expires by its terms on May 31, 1960 although it is to be continued from year to year unless certain required notices are given. The defendant, in December, 1959, moved its plant from East Orange, New Jersey, to Pennsauken, New Jersey. It takes the position that this move on its part brought the contract with the plaintiff union to an end since, it argues, the contract applies only to activities by the defendant in East Orange, New Jersey. The district judge accepted this view. In denying the motion for preliminary injunction he really passed on the merits of the case since, obviously, if the contract was no longer in force the plaintiff is not entitled to injunctive or any other kind of relief.

We disagree with the district judge in his interpretation of the contract. We do not think it is to be interpreted as applicable only to defendant's activities in East Orange, New Jeresy. And we do not think that the defendant brought it to an end by its unilateral action in moving from East Orange to Pennsauken. Since the case was decided, not upon the ground that equitable relief was not applicable, but on the ground that the plaintiff was entitled to no relief at all, we shall reverse. The case will be remanded to the district court with instructions to proceed to the consideration of the merits of the plaintiff's claim for equitable relief and any other remedy which is requested by it for the breach of contract.